

DECISION

24909
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-208237

DATE: April 19, 1983

MATTER OF: Federal Data Corporation

DIGEST:

1. Protest is untimely where protester learned of requirements to be imposed on benchmark during pre-benchmark discussions but waited until after date set for benchmark to protest.
2. Since it is not always feasible to schedule benchmarking on a date that is common to all offerors, the time set for benchmarking each offeror's equipment controls the "next closing date" for the purpose of GAO Bid Protest Procedures.

Federal Data Corporation protests actions of the Department of the Navy Automatic Data Processing Selection Office in connection with Request for Proposals (RFP) N66032-R-0003 for various computer equipment. The actions complained of led to the rejection of Federal Data's proposal when it was unable to initiate a benchmark of its proposed equipment by June 30, 1982. We dismiss the protest as untimely.

The protester raises three substantive concerns. First, Federal Data alleges that the Navy improperly insisted that it furnish various items of peripheral equipment for the benchmark which were not required by the benchmark provisions of the RFP. Second, Federal Data contends that the Navy improperly imposed an additional requirement that it benchmark its proposed IBM 4341 and Amdahl V-7 CPUs "concurrently at the same site." Finally, Federal Data complains that the Navy imposed unreasonable time restrictions on it for benchmark completion even though the RFP did not establish a date for completion of benchmarking.

025355

101164

The record shows that, subsequent to evaluation of initial proposals, Federal Data wrote the Navy on May 28, 1982 requesting permission to use for benchmarking certain peripheral equipment, including disk drives, printers and terminals which differed from that proposed. On June 4, 1982, the Navy rejected any substitution as inappropriate in view of the late date of the request and demanded that Federal Data agree to a firm benchmark schedule by the close of business on June 8. Further, the Navy advised Federal Data that, were it to propose a benchmark date beyond June 30, 1982, it might jeopardize its further participation in the procurement.

In response, Federal Data wrote the Navy on June 8, 1982, advising the Navy that it believed it was not required to benchmark specific peripheral equipment. The letter requested Navy concurrence in a proposed benchmark schedule predicated on Federal Data's belief that it had the right to use whatever peripheral equipment it deemed appropriate. It enclosed an unsigned second letter addressed to our Office protesting that the benchmark was to be conducted in a manner which, because of difficulty in obtaining IBM equipment, was calculated to favor IBM or a contractor teamed with it. Were the dispute not resolved by June 11, 1982, the letter concluded:

"We have no choice and must go ahead and file this with GAO. A protest is a very serious matter that we at Federal Data take only as a very last resort, after utilizing whatever means necessary to resolve the issues in a mutually agreeable fashion.

The June 8, 1982 Federal Data letter resulted in a meeting between Federal Data and Navy personnel after which, on June 10, the Navy wrote the protester advising it that it would be permitted to substitute a printer, terminal and 24 disk storage machines for the benchmark. The Navy insisted, however, that all other equipment be that proposed. Moreover, responding to a comment made by Federal Data at the close of the meeting, the Navy advised Federal Data that both the Amdahl V-7 and IBM 4341 "must be benchmarked concurrently at the same site."

On June 16, Federal Data wrote the Navy agreeing to a June 29-30 benchmark schedule. It advised the Navy that it would not be able to find collocated equipment but was attempting to locate an IBM machine near the Amdahl Corporation benchmark facility where the V-7 would be tested. By June 21 Federal Data had found a west coast IBM site but one which did not have certain software required for the test. Also, Federal Data had encountered difficulty in obtaining some of the equipment which the Navy had required be used in the June 10 letter. Federal Data proposed, therefore, to make further substitutions of peripheral equipment and asked the Navy for permission to defer the IBM portion of the test until the software could be obtained.

The Navy rejected Federal Data's requests in a letter dated June 22, 1982, in which it advised Federal Data that:

"The Navy's position remains as stated in the 10 June 1982 letter. Your explicit reply is requested as to whether your company can or cannot benchmark your proposed equipment during the week of 28 June 1982. If you cannot meet the conditions agreed upon for the benchmark, then your proposal may no longer be considered."

In response, Federal Data's Marketing Manager called the Navy to advise that it would not be able to perform the benchmark prior to June 30. The Navy subsequently rejected Federal Data's proposal when the company did not initiate the benchmark.

Our Bid Protest Procedures, 4 C.F.R. 21.2(b), require that protests based on alleged improprieties in a negotiated procurement which do not exist in the initial solicitation but which are subsequently incorporated therein must be protested not later than the next closing date for the receipt of proposals following the incorporation. When the alleged improprieties contain the ground rules or requirements for benchmarking, the "next closing date" is the date set for the benchmarking. Information International, Inc., 59 Comp. Gen. 640 (1980), 80-2 CPD 100. Here we think it is clear that Federal Data knew not later than when it received the Navy's June 22 letter that the Navy was insisting on the benchmarking requirements it

previously imposed. Therefore, Federal Data was required to file a protest prior to the June 30 benchmarking deadline. Federal Data did not file a protest, however, until July 13. Consequently, we consider the protest to be untimely.

Federal Data argues that June 30 should not be considered a closing date since it was not given a formal "Notice of Establishment of Closing Date for Completion of Benchmarking," and because all offerors were not notified of June 30 as a closing date.

We find no merit to Federal Data's assertions. There is no requirement that such a formal notice be provided. All that is needed, we think, is that an offeror be given reasonable notice of the establishment of a deadline. See The FMI-Hammer Joint Venture, B-206665, August 20, 1982, 82-2 CPD 160 (oral notification of a closing date for best and final offers is sufficient, absent prejudice). Moreover, while in most circumstances a common closing date must be established (e.g., in setting a date for receipt of best and final offers), the use of a common date for benchmarking is often not feasible because benchmarks must be scheduled on different days. It follows that if benchmarking is to be considered as a closing date for the purpose of the filing deadlines specified in our Bid Protest procedures, the time set for each individual offeror must control.¹

Federal Data also maintains that it did protest to the Navy prior to June 30, when its Marketing Manager called the Navy to advise it that it would not be possible to perform the benchmark prior to June 30. This conversation, it maintains, should be treated as an oral protest.

While oral protests to a contracting activity are permitted, a protester's intent to protest must be clear. Joule Technical Corporation, 58 Comp. Gen. 550 (1979), 79-1 CPD 364. Federal Data's attempt to characterize the telephone conversation as a protest is contradicted by

¹In this instance, only Federal Data was affected by the end of June cut off date because all other benchmarking had been completed in May.

contemporaneous Navy records which indicate that Federal Data was asked if it intended its actions to be treated as a protest and responded that it did not. Federal Data has not offered any evidence to rebut the Navy's record. We find that no oral protest was made.

Finally, we note that Federal Data contends that if we find the protest to be untimely, we should consider it under § 21.2 (c) of our Bid Protest Procedures (4 C.F.R. § 21.2(c)) which allows consideration of untimely protests that present an issue which is significant to procurement practice or procedure. The exception, which is invoked sparingly, contemplates a protest concerning a procurement principle of widespread interest or an issue which affects a broad class of procurements and which has not been decided previously. Kemp Industries, Inc., B-206653, March 19, 1982, 82-1 CPD 262. The questions raised here concern the proper interpretation and application of solicitation language and the possible restrictiveness of the Navy's requirements--all questions which have been frequently considered in prior decisions. The exception, therefore, does not apply.

The protest is dismissed.

Harry R. Van Cleve
Harry R. Van Cleve
Acting General Counsel